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NO. 81-2147

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT FT. MC DOWELL MOHAVE-APACHE INDIAN COMMUNITY

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ADDITIONAL STATUTORY PROVISION INVOLVED

Arizona Revised Statutes, § 45-257(B)(1), provides:

B. The court, upon review of the master's report and in accordance with rule 53 of the Arizona rules of civil procedure, shall:

1. Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source provided, when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, accept the determination of such rights and dates of appropriation as found in the judgment or decree unless such rights have been abandoned.

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Senate Report No. 699, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S. Code Cong. & Ad. News 2409, 2412	7
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I. THE NINTH CIRCUIT'S DECISIONS ARE CONSISTENT WITH THE DECISIONS OF THIS COURT.

In February 1982, the Ninth Circuit announced three decisions relating to Arizona and Montana state court jurisdiction to adjudicate Indian tribes' water rights. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982); Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982); Northern Cheyenne Tribe v. Adsit, 668 F.2d 1090 (9th Cir. 1982). [1/] The decisions have two fundamental premises in common: first, the jurisdictional disclaimer found in the Arizona and Montana Constitutions preclude

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1/ For simplicity's sake, respondent will refer to the three decisions by the same names used by petitioners -- San Carlos, Navajo Nation, and Adsit, respectively. The San Carlos and Adsit opinions contain the court's reasoning on the issues for which certiorari review is sought, while the Navajo opinion largely adopts the discussion of the other two opinions on the common jurisdictional issues. This brief, therefore, will focus on the San Carlos and Adsit decisions.

courts in either state from adjudicating tribal water rights, and; second, the state disclaimers can only be repealed or modified by affirmative action of the states themselves. Petitioners, who filed a joint application for review of the two Arizona decisions - San Carlos and Navajo Nation, challenge the Ninth Circuit's analysis as conflicting with decisions of this Court. Petitioners are simply wrong. The Ninth Circuit faithfully followed this Court's lead both in construing the state disclaimers and suggesting the proper procedure for their repeal.

In construing state constitutional disclaimers, this Court has uniformly determined them to be effective barriers to state court jurisdiction over tribal property or activities. See Washington v. Yakima Indian Nation, 439 U.S. 463, 474 (1979), where the Court indicated that, in the absence of repeal, the state constitutional disclaimers were "organic law disclaimers of

of [state] jurisdiction over Indian country . . . "; McClanahan v. Arizona Tax Comm'n, 411 U.S. 146, 175, 178 (1973), where the Court held that Arizona lacked authority to impose its income tax on Indians earning income on the reservation, in part, because the state had not repealed its jurisdictional disclaimer; Williams v. Lee, 358 U.S. 217, 222-23 (1959), where the Court relied upon Arizona's disclaimer in holding that the state court lacked jurisdiction over a civil action arising on an Indian reservation; and United States v. Sutton, 215 U.S. 291, 295-96 (1909), which held that the disclaimers literally preserved federal 'jurisdiction and control' over on-reservation, tribal matters and property.

The Court has departed from its literal construction of the disclaimers only where the disputed matter involved off-reservation, Indian activities or on-reservation activities of non-

Indians. In such instances, the Court has construed s ate disclaimers as prohibiting state claims to tribal property, not the exercise of state governmental authority. See, e.g. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973), involving state taxation of off-reservation tribal activity; Organized Village of Kake v. Egan, 369 U.S. 60, 69 (1962), regarding state regulation of off-reservation fishing rights; Draper v. United States, 164 U.S. 240, 245 (1896), concerning state jurisdiction over an on-reservation crime committed by a non-Indian against a non-Indian; and see also White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981), where the Ninth Circuit, itself, applied that distinction in upholding state regulation of on-reservation hunting and fishing of non-Indians. Those cases do not "purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control

of Indians." McClanahan, above at 176 n.15. Notwithstanding petitioners' assertion to the contrary, then, the Ninth Circuit's construction of Arizona's constitutional disclaimer as barring state court adjudication of reservation-related, tribal water rights is consistent with this Court's decisions. 2/

Likewise, petitioners' complaint that the Ninth Circuit departed from this Court's decisions respecting the manner in which state dis-

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2/ Just as the Court has limited state disclaimers to proprietary claims only when state regulation of off-reservation or non-Indian activity is involved, it has employed the tribal self-government infringement test only where off-reservation Indian activity is involved [see Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973)] or where on-reservation, non-Indian activity is concerned [see Williams v. Lee, above, and Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 174-76 (1977), where the Court upheld state regulation of Indian fishing largely because the Indian fishing right was held in common with non-Indians]. See McClanahan, above at 171-72. That, of course, is not this case. Thus, petitioners' reliance on the tribal self-government infringement test is misplaced.

claimers can be repealed is without any basis. In examining the record for an affirmative act on the part of Arizona evidencing a repeal or modification of the state disclaimer, the Ninth Circuit merely adopted the reasoning applied by this Court in a number of cases. This Court has described the state constitutional disclaimer as being "deliberately adopted by the state [and], is, without reference to the [enabling] act of Congress, the law for its legislature and people, until abrogated by the state." United States v. Rickert, 188 U.S. 432, 441 (1903) (referring to the South Dakota disclaimer). Consequently, the state constitutional disclaimer can only be modified or repealed by whatever affirmative action is required by state law to accomplish that result. See Washington v. Yakima Nation, above at 466; Kennerly v. District Court of Montana, 400

U.S. 423 (1971). 3/

Whatever effect the McCarran Amendment may have had on the federal enabling act dis-

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3/ The Yakima and Kennerly cases arose in the context of asserted state jurisdiction pursuant to Public Law 83-280, 67 Stat. 588, now codified at 18 U.S.C. sec. 1162, 28 U.S.C. sec. 1360 and, as amended in 1968, 25 U.S.C. sec. 1321 and 1322 [hereinafter cited as Public Law 280]. That statute grants civil and criminal jurisdiction to certain states over Indian reservations, but, in doing so, acknowledges the effectiveness of both the federal and state disclaimers of jurisdiction. See, in particular, S. Rep. No. 699, 83d Cong., 1st Sess., at 1953 U.S. Code Congressional and Administrative News, pp. 2409, 2412, respecting the necessity of repealing the disclaimers. The statute explicitly repeals the federal disclaimers found in the enabling act disclaimers and consents to the state repeal of the states' constitutional disclaimers. 25 U.S.C. sec. 1324. Because the statute expressly excludes water rights from its coverage, Public Law 280 does not constitute federal consent for the repeal of state disclaimers for purposes of adjudicating those rights, 25 U.S.C. sec. 1322(b). Although the statute does not impose any particular procedure on disclaimer states to repeal the state constitutional disclaimers (Yakima Nation, above at 484-85), its language and decisions construing it nonetheless provide some guidance as to how state disclaimers might be repealed for purposes such as water rights not covered by the statute.

claimer, it left Arizona's constitutional disclaimer intact. [4/] As construed by the Court in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) (Akin), the McCarran Amendment waiver of sovereign immunity applied to tribal water rights as well as those owned outright by the United States. Id. at 809. However, the Akin case arose in Colorado which, unlike Arizona, has no jurisdictional disclaimer respecting Indians and Indian property in its

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4/ The McCarran Amendment, 43 U.S.C. sec. 666, waived the United States' immunity from suit in state and federal courts in unified proceedings to adjudicate water rights in a river system. Cappaert v. United States, 426 U.S. 128 (1976). The Ninth Circuit apparently determined that the McCarran Amendment did repeal the federal enabling act disclaimer. See Adsit, C-5, where the Ninth Circuit relied on footnote 20 of the Akin opinion as indicating that the Amendment's consent to suit was not affected by Public Law 280. However, for the reasons given above, the Ninth Circuit also determined that the McCarran Amendment did not repeal the state constitutional disclaimer.

in its constitution. As a result, the Court's Akin opinion, which is silent on the jurisdictional disclaimer issue, does not indicate that the statute repealed the state disclaimers.

In light of this Court's decisions, then, the Ninth Circuit's conclusions respecting the effect of Arizona's jurisdictional disclaimer are unremarkable. It simply applied this Court's reasoning in the context of water rights adjudications and properly held that, in the absence of repeal by the state, Arizona's disclaimer prohibits its courts from reaching Indian water rights.

II. ALTHOUGH THE NINTH CIRCUIT'S ANALYSIS OF THE DISCLAIMER ISSUES DIFFERS FROM THAT OF THE TENTH CIRCUIT, REVIEW BY THIS COURT FOR THAT REASON IS PREMATURE AND PERHAPS UNNECESSARY.

A primary basis of the petition for certiorari is the assertion that the Ninth Circuit's San Carlos and Adsit opinions [5/] conflict with that of the Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. denied, 444 U.S. 995 (1979). To be sure, the two courts did employ different approaches in determining the construction and effect of the federal enabling act disclaimer and the state constitutional disclaimer. The

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5/ Although present respondent is a party to the San Carlos opinion only, all references herein to the Ninth Circuit's analysis of the disclaimer issues will be to the Adsit opinion. In Adsit, the court fully explained the "analytical framework" it thought proper to apply to those issues and the San Carlos opinion adopted the full reasoning and analysis found in Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982)." App. A at 9.

Ninth Circuit construed the disclaimers as barring state jurisdiction to adjudicate tribal water rights until repealed, but concluded that the federal impediment had effectively been removed and remanded for a determination as to whether the state disclaimer had been repealed. Adsit, App. C at 7-8; San Carlos, App. A at 11. The Tenth Circuit, on the other hand, construed the federal and state disclaimers as inapplicable to state jurisdiction over tribal water rights in the first instance, and, if relevant, as having been implicitly repealed. Jicarilla Apache Tribe, above at 1131. Whether the differing analyses of the Ninth and Tenth Circuits warrant review at this juncture, however, is another matter. Adjudication of the remanded issue in the Arizona cases has been stayed pending the petitioners' application for certiorari. As a result, the Ninth Circuit has not had its last word respecting the effect of the Arizona constitutional dis-

claimer. The extent and nature of the conflict between the two circuits will only be known after the remanded issue is litigated in the lower courts here. This Court, then, should stay its hand until the supposed conflict is both complete and certain.

The apparent conflict between the circuits is incomplete inasmuch as neither of the lower courts has undertaken the required analysis to determine whether the Arizona constitutional disclaimer, which in the Ninth Circuit's view is the only remaining effective bar to state jurisdiction, has been repealed or modified. In its Adsit opinion, the Ninth Circuit outlined the inquiry it thought necessary to resolve that outstanding issue:

> "In order to make such a finding, a court must first determine whether the [Arizona] water consolidation plan acts as a legislative repeal of the constitutional disclaimer of jurisdiction. Washington v. Yakima, supra. Second, it must determine whether such repeal required tribal consent as provided in

> the 1968 amendment to Public Law 280. Only if the [Arizona] water legislation is determined to constitute a legislative repeal within the requirements of federal law will the McCarran Amendment's grant of personal jurisdiction over the United States acting as trustee for Indian water rights, furnish the state court with the requisite personal and subject matter jurisdiction." App. C at 8.

Those remaining issues are significant since, until they are resolved, it will not be known whether Arizona courts have subject matter jurisdiction to adjudicate tribal water rights. Of course, respondent expects a determination that Arizona has not effectively repealed or modified its constitutional disclaimer. Until that determination is actually made, though, the now apparent conflict between the Ninth and Tenth Circuits respecting the effect of the disclaimers on state jurisdiction will not be fully revealed and cannot be fully resolved by this Court. See Minnick v. California Dep't of Corrections, 452 U.S. 105, 120 (1981), where the Court dismissed a writ of

certiorari on the ground, inter alia, that the outcome of future proceedings was less than certain.

It is, moreover, uncertain that a conflict between the Ninth and Tenth Circuits warranting review by this Court would survive proceedings yet to be had in the Ninth Circuit. Should the lower courts here conclude that the Arizona disclaimer has been modified or repealed, then the result in the Ninth and Tenth Circuits will be the same, albeit obtained by dissimilar reasoning. Consequently, the conflict between the Ninth and Tenth Circuits would be largely academic. In addition, the lower courts would then of necessity undertake an analysis of the so-called Akin factors to determine whether the federal court should nonetheless retain the

federal actions filed by the tribes. [6] Indications are that the Ninth Circuit would find that, pendency of a similar state action notwithstanding, the federal court should retain the original actions filed there by the tribes. [7] Although

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6/ The Akin factors are those looked to by a federal court to ascertain whether a federal suit to adjudicate water rights should be dismissed in favor of a pending, parallel state action. See Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); see also section III below. Such an inquiry is required only if the state court has concurrent jurisdiction with the federal court over the federal claims.

7/ Two observations in this respect are significant. First, although Judge Choy did not reach the Akin issues in the San Carlos opinion, he did note "that the district judge did not make findings on this issue and the record indicates significant differences between these cases and the Akin case." App. A at 10. Second, the Ninth Circuit did address the Akin factors in its Adsit opinion and concluded that the exercise of federal jurisdiction was proper for several reasons that are equally applicable to the Arizona federal actions, e.g., the relative stage of the state and federal proceedings, inadequacy of the state proceeding, conflicts of interest on the part of the United States, and jurisdiction under 28 U.S.C. sec. 1362. See App. C. at 12-17.

the conflict between the two circuits on the jurisdictional issues would be full-blown, the Akin analysis would provide an alternate basis for the Ninth Circuit's result. Were the conflict effectively mooted or avoided in that matter on remand, the need for review by this Court would certainly be less compelling, if not altogether obviated.[8/]

8/ It should be noted that allowing the Ninth Circuit to fully adjudicate the jurisdictional issue (and thereby possibly moot or avoid the conflict with the Tenth Circuit) may also result in the avoidance by this Court of a substantial constitutional question. An implicit assumption in both the petition for certiorari and the Tenth Circuit's Jicarilla opinion is that Congress has the constitutional power to grant subject matter jurisdiction to state courts where such jurisdiction has been eschewed as a matter of organic state law. See, e.g., headnote D, Petition for Certiorari, p. 12; and Jicarilla Apache Tribe, above at 1131. In respondent's view, it is doubtful that Congress can repeal or modify a state law limitation on state court jurisdiction. See National League of Cities v. Usery, 426 U.S. 833, 842-44 (1976); Testa v. Katt, 330 U.S. 386, 394 (1947). Because further proceedings in the Ninth Circuit could eliminate the claimed need for review and, consequently, the necessity of resolving a substantial constitutional issue, the petition for certiorari should be denied. Minnick v. California Dep't of Corrections, above at 123; Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1946).

Simply stated, review of the Ninth Circuit's decision by this Court for reason of the claimed conflict with the Tenth Circuit is premature. The two circuits have formulated varying analytical frameworks for determining whether state courts in disclaimer states have acquired jurisdiction to adjudicate tribal water rights, but the true nature and scope of their differences will not be known until the remanded issues are adjudicated in the Ninth Circuit. Only at that point can the conflict, if indeed it survives the remand, be effectively resolved by this Court.

III. BECAUSE OF THE NATURE OF THE ISSUE AND THE ABSENCE OF A DETERMINATION THEREON BY THE NINTH CIRCUIT, THE DISTRICT COURT'S ANALYSIS OF THE AKIN FACTORS DOES NOT WARRANT REVIEW BY CERTIORARI.

As their second question, petitioners seek review of an issue decided by the district court but not reached by the Ninth Circuit in the Arizona cases:

> "Did the Arizona district court correctly determine that considerations of wise judicial administration require adjudication of all conflicting water rights in a comprehensive state general adjudication, rather than through piecemeal federal actions?"

The 'considerations of wise judicial administration' referred to by the petitioners are those factors identified by this Court in Akin. According to the Akin decision, when a federal action to adjudicate water rights is filed and a parallel state action is pending at the same time, certain 'exceptional' circumstances may justify dismissal of the

federal action in favor of the state proceeding. Although the Court found exceptional circumstances present in Akin, it cautioned that the inquiry must be guided by the particular circumstances:

> "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." Akin, above at 818-819.

The district court in Arizona dismissed all the original jurisdiction tribal suits on the basis of Akin, but the Ninth Circuit concluded that its holding on the disclaimer issue made it unnecessary "to decide at this time whether dismissal under the doctrine of 'wise judicial administration'" was proper. App. A at 10.

The Akin issues of which petitioners seek review, then, are no more than a straightforward application of settled legal principles to the particular facts of the Arizona cases. As such,

petitioners' second question raises no significant legal issues. And because the Akin analysis is necessarily a case-by-case determination depending upon the particular "combination of factors," neither will any one application of the Akin factors (including that undertaken by the district court in Arizona) have any real significance outside that litigation. For those reasons, the Akin issues are simply not the sort generally thought to justify certiorari review. See generally Stern & Gressman, 5.8 et seq.; see also Rule 17, Rules of United States Supreme Court; and Magnum Import Co. v. DeSpoturno Coty., 262 U.S. 159, 163 (1923). Rather, petitioners' second question is indistinguishable from that described by the Supreme Court in Fields v. United States, 205 U.S. 292, 296 (1902):

> "However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal

> courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

Here, as in Fields, certiorari should be denied.

Even were the Court disposed to review the lower courts' Akin analysis, it should not do so in this case. Unlike its disposition of the Montana cases, the Ninth Circuit did not reach the Akin issues in the Arizona cases. On innumerable occasions, this Court has noted the impropriety of considering on certiorari an issue decided by the district court but expressly reserved by the court of appeals. 9/ In most such cases, the

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9/ See, e.g., Costle v. Pacific Legal Foundation, 445 U.S. 198, 218 (1980); Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979); Davis v. Passman, 442 U.S. 228, 235 n.11 (1979); Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 (1979); Rosenberg v. Yee Chien Woo, 402 U.S. 49, 50 (1971); Willingham v. Morgan, 395 U.S. 402, 410 (1969).

Court considered issues properly before it on certiorari but remanded those issues addressed by the district court and reserved by the court of appeals to the latter for its consideration. See Powell v. McCormack, 395 U.S. 486, 500 n.16 (1969), where the Court observed that when the court of appeals does not reach an issue, the Supreme Court's "general practice has been to remand the case to that court for consideration of the remaining issues." If the Court deems it improper to reach an issue reserved by the court of appeals in the course of considering other issues properly before it on certiorari, then it is surely improper to grant a petition for certiorari for the very purpose of reviewing such a question. Therefore, petitioners' application should be denied with respect to their second question presented for review.

IV. FEDERAL COURT DETERMINATION OF THE TRIBES' WATER RIGHTS WILL NOT IMPAIR ARIZONA EFFORTS TO ADJUDICATE ALL RIGHTS TO THE WATERS OF THE VERDE, SALT AND GILA RIVERS.

Petitioners' fears that federal adjudication of the tribes' water rights will somehow prevent determination of all other rights in a general state proceeding have no basis in reality. 10/ By simply submitting the tribes' federal decree for inclusion in the state decree, any interested party can insure that the state proceeding does, indeed, constitute a general stream adjudication for purposes of the McCarran

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10/ Those Arizona tribes that sought to enjoin the state proceeding also moved to remand the state proceeding to federal court. Had those tribes been successful, then, there would have been a complete adjudication of all rights in those cases as well, although in federal court.

Amendment. 11/ For that reason, federal adjudication of the tribes' federal water rights will not impair Arizona's ability to adjudicate all other water rights in the affected rivers. 12/

11/ Respondent has maintained throughout this litigation that, primarily because it does not authorize inter sese determinations of percolating ground water, the Arizona statutory scheme does not constitute a general stream adjudication within the meaning of the McCarran Amendment. Respondent believes that argument to be correct and does not intend to waive it, but only maintains herein that, assuming the Arizona statute does authorize a true general stream adjudication, the nature of the state proceeding (and, hence, the availability of the United States' waiver of immunity in the McCarran Amendment) is not altered by a prior federal court adjudication of federal reserved water rights.

12/ The timing of the federal adjudication of tribal water rights and the initiation of a unified state proceeding would, of course, be important. To insure that a unified state proceeding such as contemplated by the McCarran Amendment could go forward, the federal decree should presumably be in hand at the time the United States would otherwise be served by the state on the tribe's behalf. At that point, the tribe (or any other interested party) could file a federal decree as authorized by A.R.S. (B)(1) and the unified state action could proceed with all necessary parties present. With respect to the Verde

(footnote continued)

The Arizona water statute, in fact, expressly provides for such situations. Arizona courts are directed by the statute to adjudicate rights in a river system and,

> "when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, [to] accept the determination of such rights and dates of appropriation as found in the judgment or decree unless such rights have been abandoned." A.R.S. 257(B)(1).

Certainly, the Arizona legislature did not understand the McCarran Amendment to require that all water rights decreed in a state general stream adjudication be determined in the first instance

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12/ (footnote continued)

River waters, it should be noted that service on the approximately 80,000 water claimants has not yet begun although the state proceeding has been pending since 1978. There is every reason to believe, then, that the federal court could quantify the Community's water rights long before McCarran-authorized service is completed in the state proceeding.

in that very proceeding. See St. John's Irrigation and Ditch Co. v. Arizona Water Comm'n, 127 Ariz. 350, 352 (Ariz. Ct. App. 1980), construing the predecessor of section 257(B)(1) as authorizing the adjudication of only those rights not previously determined by a court. 13/

Petitioners' only response to the private individual water actions anticipated by section 257(B)(1) is their repeated incantation of the

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13/ The deference to prior decrees mandated in the Arizona statute is particularly appropriate here. The tribal actions filed in federal district court all invoked 28 U.S.C. sec. 1362, inter alia, as their jurisdictional basis. That statute reflects a congressional policy favoring federal court adjudication of federal Indian rights. See 1966 United States Code Congressional and Administrative News, p. 3145 et seq. Federal courts should, therefore, be allowed to adjudicate tribal water rights where, as here, the federal litigation will neither prevent nor delay a general stream adjudication of all state rights in a particular basin.

policy against piecemeal water adjudications. 14/ However, 'piecemealing' is absolutely unavoidable with respect to some of the Arizona tribal claims. For example, the Fort McDowell Mohave-Apache Community's federal complaint seeks not only a declaration of its water rights but also monetary damages against the Salt River Project for wrongful diversion of the Community's water. The sec-

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14/ As interpreted by petitioners, the policy of avoiding piecemeal adjudication reflected in the McCarran Amendment effectively preempts all actions filed in federal court by a private individual to adjudicate water rights that would otherwise be the subject of an incipient state proceeding regardless of whether the federal litigation would in fact interfere with or delay the state litigation. This Court, however, expressly reserved the question of "whether similar considerations [as those discussed therein relating to suits filed by the United States] would permit dismissal of a water suit brought by a private party in federal district court ..." Akin, 424 U.S. at 820 n.26. There is, then, no authority for petitioners' expansive interpretation of the policy disfavoring piecemeal adjudication.

ond claim is outside the McCarran Amendment's waiver of sovereign immunity and would not be determined in a state general stream adjudication. Regardless of which court adjudicates the Community's water rights, then, there will be a separate federal proceeding to adjudicate its damages claim. Thus, the avoidance of piecemeal adjudication alone cannot justify petitioners' sweeping assertion that all tribal water rights must be adjudicated in a unified state proceeding. The respondent asks only that it be allowed to adjudicate its federal rights in federal court. At that point, the resulting federal decree may be incorporated into the general state decree pursuant to section 257(B)(1). The Ninth Circuit's ruling, even if ultimately favorable to the tribes in all respects, accomplishes just that and no more.

CONCLUSION

Respondent is not unmindful of the need for an ultimate resolution by this Court of all jurisdictional issues related to state and federal adjudication of tribal water rights. Unfortunately, the petitioners and amici make their plea in the wrong case at the wrong time. The Akin issues are as yet undecided by the Ninth Circuit in the Arizona cases and the disclaimer issues are only partially determined. For those reasons, review of the Ninth Circuit's Arizona opinions will not result in the needed resolution of those issues and the petition for certiorari should be denied.

Respectfully submitted,

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